



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS

425 Eye Street N.W.

ULLB, 3rd Floor

Washington, D.C. 20536

172

FILE: [REDACTED] Office: San Francisco

Date: AUG 22 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(i) of the Immigration and Nationality Act, 8 U.S.C. 1182(i)

IN BEHALF OF APPLICANT:

[REDACTED]

Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of the Philippines who was found to be inadmissible to the United States under § 212(a)(6)(C)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation initially in 1987. The applicant divorced his first wife on November 6, 1995 and married a U.S. citizen in March 1997. The applicant is the beneficiary of an approved petition for alien relative. The applicant seeks the above waiver in order to remain in the United States and reside with his spouse.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative. The district director also stated that the applicant's blatant and repeated disregard for immigration law did not merit the favorable exercise of discretion for having used a U.S. passport on two occasions to enter the United States and a false Philippine passport and resident alien card on two occasions to enter the United States. The district director then denied the application accordingly.

On appeal, counsel states that the Service's decision is based on a legally incorrect interpretation of the term "extreme hardship" and was an abuse of discretion. Counsel also asserts that the Service's reference to misrepresentation regarding the applicant's acts in using a fraudulent U.S. passport to obtain a social security card and employment do not constitute grounds of inadmissibility under § 212(a)(6)(C)(i) of the Act.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board held that the alien's purchase of a U.S. birth certificate, the use of that document to procure by fraud a social security number and the use of both documents to seek to procure a U.S. passport fell within § 212(a)(6)(C)(i) of the Act. The Board agreed with the finding of the immigration judge who determined that the alien, by fraud and by willful misrepresentation of a material fact, sought to procure both "documentation" and "other benefits" under the Act.

On appeal, counsel states that the applicant has established extreme hardship to his wife based on the emotional and financial hardship referred to in her affidavit and other documentation submitted in conjunction with the waiver application. Counsel asserts that separation from family is probably the most significant factor in determining hardship. Counsel asserts that the Service failed to consider the closeness of the parties, the dependence of the applicant's wife on him, or that she appears to be suffering from a condition akin to post traumatic shock syndrome. Counsel states that no consideration was given to the fact that the applicant contributes almost half of the parties' household income and the effect of the loss of that income.

The applicant initially procured admission into the United States in 1987 by presenting a fraudulent U.S. passport bearing his true name and likeness. The applicant remained in the United States for approximately 10 months before returning to the Philippines. On December 7, 1989, the applicant again procured admission into the United States by presenting the same fraudulent passport. He then used that fraudulent passport to procure a Social Security number and card. In February 1992, the applicant commenced unauthorized employment. He testified that he made a false claim to U.S. citizenship to obtain that employment.

On April 6, 1992 and February 26, 1993, the Service received Form I-589 (Request for Asylum) from the applicant. On the first application he indicated that he had entered the United States as a U.S. citizen. On the second application he indicated that he was admitted to the United States on December 7, 1989 as a nonimmigrant visitor with authorization to remain for six months. The applicant failed to appear for the scheduled interview. The applicant further testified that between 1993 and 1995 he made to brief visits to Canada and was admitted to the United States after each visit by presenting a fraudulent Filipino passport and a fraudulent Alien Registration Card in another person's name. After failing to appear for the scheduled asylum interview, an Order to Show Cause was issued in his behalf on November 27, 1997.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a § 212(a)(6)(C)(i) violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

In 1986, Congress expanded the reach of the ground of inadmissibility in the Immigration Marriage Fraud Amendments of 1986, P.L. No. 99-639, § 6(a), 100 Stat. 3537, redesignated as § 212(a)(6)(C) of the Act by the Immigration Act of 1990 (Pub. L. No. 101-649, Nov. 29, 1990, 104 Stat. 5067). In 1986, Congress imposed the statutory bar on (a) those who made oral or written misrepresentations in seeking admission into the United States; (b) those who have made material misrepresentations in seeking entry admission into the United States or "other benefits" provided under the Act; and (c) it made the amended statute applicable to the receipt of visas by, and the admission of, aliens occurring after the date of the enactment based on fraud or misrepresentation occurring before, on, or after such date. This feature of the 1986 Act renders an alien perpetually inadmissible based on past misrepresentations.

In 1990, § 274C of the Act, 8 U.S.C. 1324c, was inserted by the Immigration Act of 1990 (P.L. 101-649, Nov. 29, 1990, 104 Stat. 5059), effective for persons or entities that have committed violations on or after November 29, 1990. Section 274C(a) provided penalties for document fraud stating that it is unlawful for any person or entity knowingly-

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act,...(or to obtain a benefit under this Act). The latter portion was added in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

In 1994 Congress passed the Violent Crime Control and Law Enforcement Act (P.L. 103-322, September 13, 1994), which enhanced the criminal penalties of certain offenses, including 18 U.S.C. 1546:

(a)...Impersonation in entry document or admission application; evading or trying to evade immigration laws using assumed or fictitious name...knowingly making false

statement under oath about material fact in immigration application or document....

(b) Knowingly using false or unlawfully issued document or false attestation to satisfy the Act provision on verifying whether employee is authorized to work.

The penalty for a violation under (a) increased from up to 5 years imprisonment and a fine or both to up to 10 years imprisonment and a fine or both. The penalty for a violation under (b) increased from up to 2 years imprisonment or a fine or both to up to 5 years imprisonment or a fine, or both.

To recapitulate, in addition to fraudulently procuring admission into the United States by presenting a fraudulent U.S. passport in 1987 and 1989, the applicant knowingly obtained a Philippine passport in an assumed name and a fraudulent Alien Registration Card in another person's name and used those documents to procure admission into the United States in 1993 and 1995 (a felony).

In 1996, Congress expanded the document fraud liability to those who engage in document fraud for the purpose of obtaining a benefit under the Act. Congress also restricted § 212(i) of the Act in a number of ways with the recent IIRIRA amendments. First, immigrants who are parents of U.S. citizen or lawful permanent resident children can no longer apply for this waiver. Second, the immigrant must now show that refusing him or her admission would cause extreme hardship to the qualifying relative. Third, Congress eliminated the alternative 10-year provision for immigrants who failed to have qualifying relatives. Fourth, Congress eliminated judicial review of § 212(i) waiver decisions, and Fifth, a child is no longer a qualifying relative.

After reviewing the amendments to the Act and to other statutes regarding fraud and misrepresentation from 1957 to the present time, and after noting the increased impediments Congress has placed on such activities, including the narrowing of the parameters for eligibility, the re-inclusion of the perpetual bar and eliminating children as a consideration in determining the presence of extreme hardship, it is concluded that Congress has placed a high priority on reducing and/or stopping fraud and misrepresentation related to immigration and other matters.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from § 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, 21 I&N Dec. 296 (BIA 1996).

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act include, but are not limited to, the following: the presence of a lawful permanent resident or United States citizen spouse or parent in this country;

the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

In Perez v. INS, 96 F.3d 390 (9th Cir. 1996), the court stated that "extreme hardship" is hardship that is unusual or beyond that which would normally be expected upon deportation. The common results of deportation are insufficient to prove extreme hardship.

The court held in INS v. Jong Ha Wang, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

There are no laws that require a United States citizen to leave the United States and live abroad. The applicant's spouse is employed in the United States and his roots are in this country. He is not required to leave and go to the Philippines. Further, the common results of deportation are insufficient to prove extreme hardship. See Hassan v. INS, 927 F.2d 465 (9th Cir. 1991). The uprooting of family and separation from friends does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported. See Shooshtary v. INS, 39 F.3d 1049 (9th Cir. 1994). In Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), the court stated that, "even assuming that the Federal Government had no right either to prevent a marriage or destroy it, we believe that here it has done nothing more than to say that the residence of one of the marriage partners may not be in the United States."

The record contains a statement from [REDACTED] Marriage Family Counselor dated December 21, 1998, in which he indicates that the applicant and his wife (hereafter referred to as [REDACTED]) are the caretakers of her two children from a prior marriage which ended in August 1995. The statement indicates that [REDACTED] suffered a work-related leg injury and underwent arthroscopic surgery which was incorrectly done and has left her disabled. The injury has made her more dependent on the applicant. The statement discusses [REDACTED] previous traumatic separation from her former spouse which left her heartbroken and she went into major depression. [REDACTED] states that the loss of the applicant would bring extreme hardship to Gliceria.

The record contains a December 11, 1998 statement from a physician who indicates that she is treating [REDACTED] and because of her problem she is currently working only 4 to 6 hours per day, 5 days per week and she is receiving partial disability as a result. The record fails to contain a current evaluation of Gliceria's physical problem.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above

the normal economic, emotional and social disruptions involved in the removal of a family member.

The grant or denial of the above waiver does not turn only on the issue of the meaning of "extreme hardship." It also hinges on the discretion of the Attorney General and pursuant to such terms, conditions, and procedures as she may by regulations prescribe.

In Matter of Cervantes-Gonzalez, the Board also held that the underlying fraud or misrepresentation may be considered as an adverse factor in adjudicating a § 212(i) waiver application in the exercise of discretion. Matter of Tijam, Interim Decision 3372 (BIA 1998), followed. The Board declined to follow the policy set forth by the Commissioner in Matter of Alonso, 17 I&N Dec. 292 (Comm. 1979); Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979), and noted that the United States Supreme Court ruled in INS v. Yueh-Shaio Yang, 519 U.S. 26 (1996), that the Attorney General has the authority to consider any and all negative factors, including the respondent's initial fraud.

It is noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States in 1987, 1989, 1993 and 1995 by fraud, procured a Social Security Card by fraud, procured employment by willful misrepresentation and married his spouse in March 1997. He now seeks relief based on that after-acquired equity.

In its analysis conducted in Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), a § 212(i) matter, the BIA found cases involving suspension of deportation and other waivers of inadmissibility to be helpful given that both forms of relief require extreme hardship and the exercise of discretion.

The favorable factors include the applicant's family tie, the absence of a criminal record, and general hardship to the qualifying relative.

The unfavorable factors include the applicant's procuring admission into the United States by fraud on four occasions, procuring a Social Security Card by fraud, employment without Service authorization, and his lengthy unauthorized stay in the United States.

The Board stated in Matter of Cervantes-Gonzalez, that United States Supreme Court ruled in INS v. Yueh-Shaio Yang, that the Attorney General has the authority to consider any and all negative factors, including the alien's initial fraud, in deciding whether or not to grant a favorable exercise of discretion. The Associate Commissioner, following Matter of Tijam, does not deem it improper to give less weight in a discretionary matter to an alien's marriage which was entered into in the United States following a fraudulent entry and after a period of unlawful residence in the

United States as opposed to a marriage entered into abroad followed by a fraudulent entry.

In the latter scenario the alien who marries abroad legitimately gains an equity or family tie which may result in his or her obtaining an immigrant visa and entering the United States lawfully even though the alien may fraudulently enter the United States after the marriage and before obtaining the visa. Whereas in the former scenario the alien who marries after he or she fraudulently enters the United States and resides without Service authorization does gain an after-acquired equity or family tie that he or she was not entitled to without the perpetration of the fraud.

Notwithstanding that the decision in Carnalla-Muñoz v. INS, related to an alien in removal or deportation proceedings, the alien's equity was gained subsequent to a violation of an immigration law, and when considering an issue as a matter of discretion an equity gained contrary to law should receive less weight than an equity gained through legal and legitimate means.

The applicant's actions in this matter cannot be condoned. The unfavorable factors in this matter outweigh the favorable ones. In proceedings for application for waiver of grounds of inadmissibility under § 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.